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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10

11 WILLIAM GUY,

No. CIV S-03-1208-DFL-CMK-P

12 Plaintiff,

13 vs.

ORDER

14 D. KIMBRELL, et al.,

15 Defendants.
16 _____/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant
18 to 42 U.S.C. § 1983.

19 On February 14, 2007, the court directed plaintiff to submit documents for service
20 by the United States Marshal. Plaintiff was required to comply within 30 days of the date of the
21 order. More than 30 days passed and plaintiff failed to comply. On March 22, 2007, the court
22 issued findings and recommendations that this action be dismissed for lack of prosecution.
23 When those findings and recommendations were signed, however, plaintiff's submission of
24 documents on March 20, 2007, had not appeared on the court's docket. The findings and
25 recommendations issued on March 22, 2007, will be vacated.

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1 The court has determined that this action appears to state a cognizable claim for
2 relief against defendants Borges, Peterson, Neves, and Kimbrell¹ and directed plaintiff to provide
3 documentation for service of process by the United States Marshal. Plaintiff has now submitted
4 the required papers.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. The March 22, 2007, findings and recommendations (Doc. 23) are
7 vacated;

8 2. The Clerk of the Court is directed to forward the instructions for service of
9 process, the completed summons form(s), copies of the complaint, and a copy of this order to the
10 United States Marshal;

11 3. Within ten days from the date of this order, the United States Marshal is
12 directed to notify defendant(s) of the commencement of this action and to request a waiver of
13 service of summons in accordance with the provisions of Federal Rule of Civil Procedure 4(d)
14 and 28 U.S.C. § 566(c);

15 4. The United States Marshal is directed to retain the sealed summons and a
16 copy of the complaint in their file for future use;

17 5. The United States Marshal shall file returned waivers of service of
18 summons, as well as any requests for waivers that are returned as undelivered, as soon as they
19 are received;

20 6. If a waiver of service of summons is not returned by a defendant within
21 sixty days from the date of mailing the request for waiver, the United States Marshal shall:

22 a. Personally serve process and a copy of this order upon the
23 defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure and

24 ¹ These are the only four individuals named in the second amended complaint filed
25 on July 3, 2006, which is the operative pleading. Because the second amended complaint
26 supercedes all prior pleadings, these are the only named defendants. The Clerk of the Court is
directed to update the court's docket to terminate all other defendants. For purposes of the
caption, defendant Kimbrell is the lead defendant.

1 28 U.S.C. § 566(c), shall command all necessary assistance from the
2 California Department of Corrections to execute this order, and shall
maintain the confidentiality of all information provided by the California
Department of Corrections pursuant to this order;

3 b. Within ten days after personal service is effected, the
4 United States Marshal shall file the return of service for the defendant,
along with evidence of any attempts to secure a waiver of service of
summons and of the costs subsequently incurred in effecting service on
5 said defendant;

6 c. Costs incurred in effecting service shall be enumerated on
the USM-285 form and shall include the costs incurred by the Marshal's
7 office for photocopying additional copies of the summons and amended
complaint and for preparing new USM-285 forms, if required; and

8 d. Costs of service will be taxed against the personally served
defendant in accordance with the provisions of Federal Rule of Civil
Procedure 4(d)(2);
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10 7. Defendant(s) shall reply to the complaint within the time provided by the
11 applicable provisions of Federal Rule of Civil Procedure 12(a);

12 8. Unless otherwise ordered, all motions to dismiss, motions for summary
13 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59
14 and 60 of the Federal Rules of Civil Procedure, and motions shall be briefed pursuant to Local
15 Rule 78-230(m), and failure to oppose such a motion timely may be deemed a waiver of
16 opposition to the motion; opposition to all other motions need be filed only as directed by the
17 court;

18 9. If plaintiff is released from prison at any time during the pendency of this
19 case, any party may request application of other provisions of Local Rule 78-230 in lieu of Local
20 Rule 78-230(m), which will continue to govern all motions described in no. 7, above, in the
21 absence of a court order granting such a request;

22 10. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),
23 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to
24 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of

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1 the Federal Rules of Civil Procedure:

2 Such a motion is a request for dismissal of unexhausted claims
3 without prejudice. The defendant may submit affidavits or declarations
4 under penalty of perjury and admissible documentation to support the
5 motion to dismiss. To oppose the motion, plaintiff may likewise file
6 declarations under penalty of perjury and admissible documentation.
7 Plaintiff may rely upon statements made under the penalty of perjury in
8 the complaint if the complaint shows that plaintiff has personal knowledge
9 of the matters stated and plaintiff calls to the court's attention those parts
10 of the complaint upon which plaintiff relies. Plaintiff may serve and file
11 one or more affidavits or declarations by other persons who have personal
12 knowledge of relevant matters. Plaintiff may also rely upon written
13 records, but plaintiff must prove that the records are what plaintiff claims
14 they are. If plaintiff fails to contradict defendant's evidence with
15 admissible evidence, the court may rely on the defendant's evidence. In
16 the event both sides submit matters outside the pleadings, the court may
17 look beyond the pleadings and decide disputed issues of fact. If plaintiff
18 does not serve and file a written opposition to the motion, the court may
19 consider the failure to act as a waiver of opposition to the defendant's
20 motion. If the defendant's motion to dismiss, whether opposed or
21 unopposed, is granted, plaintiff's unexhausted claims will be dismissed
22 without prejudice.

23 11. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en
24 banc), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the
25 following requirements for opposing a motion for summary judgment made by defendants
26 pursuant to Rule 56 of the Federal Rules of Civil Procedure:

17 Such a motion is a request for an order for judgment in favor of
18 defendants without trial. A defendant's motion for summary judgment
19 will set forth the facts that the defendants contend are not reasonably
20 subject to dispute and that entitle the defendants to judgment. To oppose a
21 motion for summary judgment, plaintiff must show proof of his or her
22 claims. Plaintiff may do this in one or more of the following ways.
23 Plaintiff may rely upon statements made under the penalty of perjury in
24 the complaint if the complaint shows that plaintiff has personal knowledge
25 of the matters stated and plaintiff calls to the court's attention those parts
26 of the complaint upon which plaintiff relies. Plaintiff may serve and file
one or more affidavits or declarations setting forth the facts that plaintiff
believes prove plaintiff's claims; the person who signs an affidavit or
declaration must have personal knowledge of the facts stated. Plaintiff
may rely upon written records, but plaintiff must prove that the records are
what plaintiff claims they are. Plaintiff may rely upon all or any part of
the transcript of one or more depositions, answers to interrogatories, or
admissions obtained in this proceeding. If plaintiff fails to contradict the
defendants' evidence with counteraffidavits or other admissible evidence,
the defendants' evidence may be taken as the truth and the defendants'

1 motion for summary judgment granted. If there is some good reason why
2 such facts are not available to plaintiff when required to oppose a motion
3 for summary judgment, the court will consider a request to postpone
4 considering the defendants' motion. If plaintiff does not serve and file a
5 written opposition to the motion or a request to postpone consideration of
6 the motion, the court may consider the failure to act as a waiver of
7 opposition to the defendants' motion. If the defendants' motion for
8 summary judgment, whether opposed or unopposed, is granted, judgment
9 will be entered for the defendants without a trial and the case will be
10 closed.

11 12. A motion or opposition supported by unsigned affidavits or declarations
12 will be stricken;

13 13. Each party shall keep the court informed of a current address at all times
14 while the action is pending, and any change of address must be reported promptly to the court in
15 a separate document captioned for this case and entitled "Notice of Change of Address," which
16 also must be properly served on all other parties;

17 14. The failure of any party to comply with this or any other court order, the
18 Federal Rules of Civil Procedure, or the local rules of this court may result in the imposition of
19 appropriate sanctions, including dismissal of the action or entry of default; and

20 15. The Clerk of the Court is directed to serve upon plaintiff a copy of the
21 court's local rules.

22 DATED: June 7, 2007.

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CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE